APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 81-1172

WILLIAM ARTHUR WIDGERY, *Appellant*,

v.

UNITED STATES OF AMERICA, *Appellee*.

Appeal From The United States District Court For The Western District Of Missouri

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Submitted: November 12, 1981
Filed: March 31, 1982

Before ROSS and STEPHENSON, Circuit Judges, and HOWARD, District Judge.*

HOWARD, District Judge

This is an appeal by the appellant, William Arthur Widgery, from the district court's[1] denial of his motion and supplemental motions for a new trial on grounds of newly discovered evidence. The thrust of appellant's argument for reversal is that the district court applied the wrong standard of review in considering his motion and supplemental motions for a new trial and abused its discretion in not affording him an evidentiary hearing on his motions. We affirm.

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*George Howard, Jr., District Judge, Eastern and Western Districts of Arkansas, sitting by designation.

[1] The Honorable Scott O. Wright, United States District Judge for the Western District of Missouri.

The pertinent facts for a proper resolution of the issues tendered are: Appellant was charged on October 4, 1979, in a twenty-eight count indictment with mail and wire fraud in violation of Title 18 U.S.C. §§ 1341 and 1343 (1976), in connection with the submission of orders for car washing equipment to Robo Wash, Inc.[2] The jury returned a verdict of guilty on Counts I through X and not guilty on Counts XI through XXVIII. Appellant was sentenced to pay a $500.00 fine on each count and to be imprisoned for a term of five years on each count, the sentences to run concurrently. The appellant appealed his conviction to this Court. On December 5, 1980, this Court reversed his conviction on Counts V and X and affirmed the remaining counts. *United States* v. *Widgery*, 636 F.2d 200 (8th Cir. 1980).

On December 29, 1980, appellant filed a motion for a new trial on grounds of newly discovered evidence which was denied by the trial court on February 11, 1981. Appellant filed an appeal to this Court. On March 9, 1981, appellant filed a motion for remand to the trial court in order to supplement the record with additional newly discovered evidence. On March 30, 1981, this Court remanded the case to the district court, stating:

> "the district court shall supplement the record by inclusion of the alleged new evidence . . . and may in its discretion grant an evidentiary hearing if it appears necessary to do so."

The purported relevance of the alleged newly discovered evidence, identified later, may be understood clearly by the following summary: Braxton Jones, president of Robo Wash, and who testified on behalf of the government that the orders

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[2] On February 4, 1977, appellant entered into an agreement with Robo Wash to produce a sufficient number of orders for equipment in order to generate a profit for Robo Wash so that its tax return for the fiscal year ending September 30, 1977, would show a before-tax profit on line 28 of $135,000. The figure of $135,000 was designated because Robo Wash had a loss carry forward of $135,000 that it would lose if it were not taken in the taxable year ending September, 1977.

were fraudulent, took the orders from appellant and used them as security for loans from Goppert Bank which had financed Robo Wash over a number of years. Appellant claimed that the orders were legitimate although contingent on financing and that Jones committed the fraud when he used the orders as security without explaining the contingencies.

Since the trial, appellant allegedly discovered new evidence which establishes that Braxton Jones defrauded Goppert Bank on a number of loan transactions unrelated to appellant. Appellant further contends that Jones committed perjury in order to implicate and place the blame on him. Further, appellant claims that newly discovered evidence reveals that the government had knowledge of the wrongdoing of Jones and failed to disclose this to appellant before trial.

The district court allowed the record to be supplemented and after reviewing the record, the trial court determined that an evidentiary hearing was unwarranted and again denied the motion for a new trial. The present appeal ensued.

I.

Appellant urged the district court, as he now does on appeal, to apply the standards enunciated in *United States* v. *Runge*, 593 F.2d 66 (8th Cir. 1979) rather than the traditional and stricter test in *United States* v. *Ward*, 544 F.2d 975 (8th Cir. 1976), in evaluating his motions for new trial. To obtain a new trial under *Ward*, a movant must meet the following five requirements: (1) the evidence must be in fact newly discovered, that is, discovered since the trial; (2) facts must be alleged from which the court may infer diligence on the part of the movant; (3) the evidence relied upon must not be merely cummulative or impeaching; (4) it must be material to the issues involved; and (5) it must be of such nature that, on a new trial, the newly discovered evidence would probably produce an acquittal.

Under *Runge*, "knowing use of perjured testimony requires that a conviction be set aside 'if there is any reasonable likeli-

hood that the false testimony could have affected the judgment of the jury.' " *United States* v. *Runge*, supra, at 73, quoting from *United States* v. *Agurs*, 427 U.S. 97 at 103.

To demonstrate perjury by Jones, appellant submitted several documents including affidavits from Nelse Carlson concerning the Goppert Bank transaction, from James Harold regarding the procedure for obtaining financing, and from Harry Duggan "clarifying" his trial testimony. He also sought to demonstrate the government's knowledge and use of perjured testimony by documents filed in a civil action that were submitted by Goppert Bank to its insurance company on certain losses sustained by the bank in its financial dealings with Robo Wash. Since these documents indicate that the bank reported the circumstances of the fraudulent transaction to the F.B.I. office in Kansas City on March 30, 1978, appellant argues the government, including the attorneys prosecuting the case, knew or should have known that Jones would have given perjured testimony at trial to conceal his own criminal activities.

To invoke the *Runge* test, there must be "specific instances of prosecutorial misconduct, such as the use of 'known perjured testimony,' in a deprivation of fundamental due process." *United States* v. *Carlone*, 603 F.2d 63 (8th Cir. 1979). The district court found, and we agree, that the evidence relating to the government's knowledge of the alleged perjury is based on speculation and conjecture. Therefore, the district court did not err in rejecting the *Runge* test and instead using the *Ward* test in evaluating the motions for new trial.

Appellant further contends that he is entitled to a new trial even if the *Ward* standards are applied. To demonstrate that the newly discovered evidence was in fact discovered after trial, he points out that through an investigation following the trial, the work papers of the accountants who performed an audit of Robo Wash in 1977 were discovered. He contends he meets the requirement of due diligence since the case was extremely complex; there were geographic problems with

appellant, his attorney and the witnesses dispersed in Kansas City, Missouri, Florida and Indiana; there was no way to learn of the other fraudulent transactions unrelated to appellant; trial counsel had tried to obtain a relevant 1977 tax return previously; and Jones changed his testimony at trial from what was expected so appellant had no way of knowing there would be a need for evidence to impeach Jones. While acknowledging that the newly discovered evidence is impeaching, appellant asserts that it is not "merely impeaching", but is substantive evidence since it establishes that someone other than appellant committed the crimes. Appellant argues that the Jurgens Vrooman, Inc.'s evidence—a loan from Goppert Bank which was allegedly secured by an incomplete sale of equipment to Jurgens Vrooman, Inc.—is material since it directly relates to Jones' knowledge and involvement; the tax return is material since it rebuts appellant's alleged motive; and that certain affidavits are material in establishing over twenty incidents where Jones committed perjury. He states he meets the final *Ward* requirement since this evidence would probably produce an acquittal since Jones' testimony would be completely discredited and his testimony was the basis for the convictions.

An appellate court does not sit as a *de novo* fact-finder. "Our review of a grant or denial of a motion for a new trial based on newly discovered evidence is limited, and the trial court's decision will not be reversed absent a clear abuse of discretion." *United States* v. *Adkins*, 545 F.2d 1153 at 1154 (8th Cir. 1976). The district court found appellant's newly discovered evidence to be merely impeaching and with due diligence could have been discovered prior to trial. The district court further found that there was little likelihood that the jury's verdict would be affected by the new evidence.

The primary obstacle to appellant's request for a new trial is his failure to meet the requirement that the evidence not be cummulative or merely impeaching. All the evidence submitted is a series of attacks on Jones' testimony. Stripped of argument, the fact remains that the evidence is merely impeaching and is a continuation of the strategy employed at

trial. Appellant also has problems with other *Ward* requirements. The evidence and arguments presented tend to show that the material now relied upon could have been discovered prior to trial with due diligence. Finally, we are not persuaded that the evidence, on a retrial, would probably produce an acquittal.

II.

A brief note should be mentioned regarding appellant's argument that the district court erred in not holding an evidentiary hearing. On remand we directed the district court to allow the record to be supplemented and, in its discretion, to hold a hearing if deemed necessary. Appellant was given the opportunity to submit evidence and argument in support of his motions. The record reveals that he responded by filing at least six affidavits and other documents. Based on the record before us, we can find no abuse of discretion.

Affirmed.

A true copy.

Attest: CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

September Term, 1981

No. 81-1172

UNITED STATES OF AMERICA, *Appellee*,

v.

WILLIAM ARTHUR WIDGERY, *Appellant*.

Appeal From The United States District Court For The Western District Of Missouri

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Petition of appellant for rehearing filed in this cause having been considered, it is now here ordered by this Court that the same be, and it is hereby, denied.

May 6, 1982

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

No. 79-00134-01-CR-W-1-5

UNITED STATES OF AMERICA, *Plaintiff*,

v.

WILLIAM ARTHUR WIDGERY, *Defendant*.

Filed February 11, 1981

MEMORANDUM AND ORDER

In a twenty-eight count indictment returned by the grand jury on October 4, 1979, William Arthur Widgery was charged with mail fraud and wire fraud in violation of 18 U.S.C. §§ 1341 and 1343 (1976). Following a jury trial, Widgery was found guilty of five counts of mail fraud and five counts of wire fraud. A timely appeal was filed, and the United States Court of Appeals for the Eighth Circuit recently affirmed Widgery's convictions on eight of the ten counts, setting aside one count each of mail fraud and wire fraud for lack of sufficient evidence. *United States* v. *Widgery*, No 80-1385 (8th Cir., Dec. 5, 1980). This case is now before the Court on defendant's motion for new trial based on the ground of newly discovered evidence.

Defendant's motion for new trial is premised on several items of alleged newly discovered evidence which purportedly show that Braxton Jones, a prosecution witness at Widgery's trial, deliberately perjured himself in order to conceal his own fraudulent and unlawful conduct. Jones was president of Robo Wash, Inc., a company that manfactured automatic car wash equipment. On behalf of Robo Wash, he entered into an agreement with Widgery on February 4, 1977, that required Robo Wash to transfer 625,000 shares of lettered common stock to Widgery. In return, Widgery agreed to supply Robo Wash

with certain operational and administrative assistance. Among other things, Widgery promised to generate $135,000 in "before tax" net income for Robo Wash prior to October 1, 1977. In order to produce this income Widgery solicited purchasers of Robo Wash car wash equipment. Using purchase orders channeled to Robo Wash by Widgery as security, Jones obtained loans totaling several thousand dollars from Goppert Bank. Robo Wash was ultimately unable to repay these loans. Widgery contends that the loans were procured under fraudulent circumstances and that Jones' testimony at trial was geared toward concealing his own fraud and shifting the blame for any wrongdoing to Widgery. In support of this contention, defendant advances the following items of alleged newly discovered evidence:

(1) The gist of Larry Duggan's testimony at trial was that a purchase order submitted to Robo Wash on behalf of Suncoast Dock & Davit Corporation was false and bore Duggan's forged signature. In a sworn affidavit given to defendant, Duggan now states that the purchase order was actually legitimate but contingent upon consummation of certain financing arrangements. Defendant insists that Braxton Jones was fully aware of the tentative nature of the purchase order at the time he received it, but nevertheless used the purchase order to obtain a $40,000 loan from Goppert Bank. Duggan's affidavit indicates that he was not entirely forthright at trial because he feared personal liability for the Suncoast purchase order.

(2) Braxton Jones testified at trial that Widgery failed to produce the "before tax" net income called for in their agreement. Defendant contends that this testimony was false and offers Robo Wash's corporate tax return for 1977, and sworn statements by two accounts who audited Robo Wash as proof that Jones committed perjury.

(3) Defendant avers that Braxton Jones secured a $40,000 loan from Goppert Bank with a purchase order submitted by Jurgens Vrooman, Inc. of Beatrice, Nebraska. Defendant submits the sworn affidavit of Lowell Squire, a Robo Wash dis-

tributor whose territory encompassed Beatrice, Nebraska, as proof that this purchase order was false. Since this purchase order was not solicited by Widgery, defendant argues that this is evidence that Jones engaged in fraudulent conduct independent of his dealings with Widgery and was motivated to perjure himself in order to implicate Widgery as the fraudulent party.

(4) At trial Braxton Jones testified that Widgery mailed him a purchase order for car wash equipment to be installed at a site in Indianapolis, Indiana. This purchase order was signed by Haskell Stone, but Jones stated that he never had any personal discussion with Stone regarding the construction of the Indianapolis facility. Defendant now tenders Haskell Stone's affidavit wherein he states that he discussed this purchase order with Jones. Moreover, Stone alleges that Jones was aware that his purchase order was contingent upon approval of a SBA loan for which Stone had applied. Defendant submits that this establishes that Jones knew of the contingent nature of the purchase order at the time he used it to obtain financing from Goppert Bank.

(5) Braxton Jones apparently obtained financing from Goppert Bank based on a purchase order submitted on behalf of C & C Sales in Siloam Springs, Arkansas. Defendant contends that this purchase order, as well as an invoice and sight draft submitted to Goppert Bank, was manufactured by Jones and was falsely inflated. An affidavit signed by Nelse Carlson states that this equipment was paid for at the time it was received and that he did not sign a purchase order for it.

(6) Defendant claims that Jones fraudulently obtained financing from Goppert Bank using a false purchase order and sight draft purportedly submitted by James J. Harold, Inc. of Punta Gorda, Florida. Harold's affidavit indicates that he paid for the equipment by check and did not authorize a sight draft drawn on the First National Bank of Punta Gorda.

Defendant argues that the foregoing evidence establishes that Braxton Jones consistently engaged in activities designed

to defraud Goppert Bank out of thousands of dollars. According to defendant's theory, Jones perceived Widgery as a convenient scapegoat and repeatedly perjured himself during Widgery's trial in order to divert the blame for any fraud to the defendant. Defendant requests an evidentiary hearing at which he can present both the above-recited evidence and other, additional evidence to support his motion for new trial. The Court, however, finds that an evidentiary hearing is unnecessary and that, under the circumstances presented here, defendant is not entitled to a new trial.

The standards for the granting of a motion for new trial on the ground of newly discovery evidence have been enumerated many times by our court of appeals. In order to obtain a new trial, the movant must satisfy five requirements:

> (1) the evidence must be in fact newly discovered, that is, discovered since the trial; (2) facts must be alleged from which the court may infer diligence on the part of the movant; (3) the evidence relied upon must not be merely cumulative or impeaching; (4) it must be material to the issues involved, and (5) it must be of such nature that, on a new trial, the newly discovered evidence would probably produce an acquittal.

United States v. *Ward*, 544 F.2d 975, 977 (8th Cir. 1976). *Accord*, *United States* v. *Cardarella*, 588 F.2d 1204, 1205 (8th Cir. 1978); *United States* v. *Frye*, 548 F.2d 765, 769 (8th Cir. 1977); *United States* v. *McColgin*, 535 F.2d 471, 476 (8th Cir. 1976); *United States* v. *Pope*, 415 F.2d 685, 691 (8th Cir.), *cert. denied*, 397 U.S. 950, 90 S.Ct. 973 (1969); *Batsell* v. *United States*, 403 F.2d 395, 403 (8th Cir. 1968), *cert. denied*, 393 U.S. 1094, 89 S.Ct. 865 (1969).

Although *Ward* states the traditional test for determining whether a new trial should be ordered on the ground of newly discovered evidence, the Eighth Circuit recently has indicated that a different standard should be applied in certain circum-

stances. In *United States* v. *Runge*, 593 F.2d 66 (8th Cir. 1979), the court stated

> [u]nlike the stricter standard of materiality used in new trial motions based on discovery of new evidence or failure of the prosecution to disclose favorable evidence, knowing use of perjured testimony requires that a conviction be set aside "if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury."

Id. at 73, quoting from *United States* v. *Agurs*, 427 U.S. 97, 103, 96 S. Ct. 2392, 2397 (1976). The *Runge* standard, however, is applicable only to those cases involving "specific instances of prosecutorial misconduct, such as the use of 'known perjured testimony,' or other governmental corruption of the truth finding process resulting in a deprivation of fundamental due process." *United States* v. *Carlone*, 603 F.2d 63, 67 (8th Cir. 1979). *See also United States* v. *Burkhead*, 491 F. Supp. 1166, 1171-174 (W.D. Mo. 1980) (thorough discussion of the distinction between the *Ward* and *Runge* tests).

While defendant does not cite *Runge*, he does recognize that a lesser standard is applied when a conviction is obtained through the use of known perjured testimony. *See* defendant's suggestions in support of motion for new trial at 12. But the record in this case, as well as defendant's present motion, is utterly devoid of any evidence that counsel for the government actually knew or should have known that Braxton Jones' testimony might be perjured. Defendant simply asserts that Jones' "fraud was so pervasive that it is clear that the United States knew that there were irregularities with Robo Wash's loan transaction unrelated to Mr. Widgery." Defendant's supplemental motion for new trial at 7. Whether the prosecution was aware of any actual or alleged irregularities in Jones' financial dealings with Goppert Bank is far from established. At best, it might be argued that the government was negligent in failing to investigate more thoroughly Jones' financial transactions with Goppert Bank. However, this Court refuses to "employ the omniscience of a Monday morning quarterback as the standard for determining what investigation should

have been made by the government." *United States* v. *Stofsky*, 527 F.2d 237, 244 (2d Cir. 1975), *cert. denied*, 429 U.S. 819, 97 S. Ct. 65-66 (1976). And, in the absence of any substantial evidence that the prosecutor knew or should have known that Braxton Jones' testimony was perhaps perjured, the Court declines to apply the less restrictive standard enunciated in *Runge*. Thus, the Court concludes that the criteria set forth in *Ward* provide the appropriate standards for determining defendant's entitlement to a new trial based on newly discovered evidence.

Addressing first defendant's request for an evidentiary hearing on his motion for new trial, the Court notes that, generally speaking, a trial court has the discretion, after consideration of the briefs and affidavits submitted in support of the new trial motion, to deny a request for such a hearing. *United States* v. *Pitts*, 508 F.2d 1237, 1241 (8th Cir. 1974), *cert. denied*, 421 U.S. 961, 95 S. Ct. 1958 (1975). Although in some cases there may be exceptional circumstances which require that an oral hearing be granted, "[a] motion for new trial based on newly discovered evidence may be decided ordinarily upon affidavits without a hearing." *United States* v. *Ward*, 544 F.2d 975, 976 (8th Cir. 1976). After consideration of all the circumstances of this case, the Court finds that little useful purpose would be served in holding a formal evidentiary hearing and defendant's request for a hearing will, therefore, be denied.

Turning now to the facts of this case, and the circumstances surrounding the alleged discovery of new evidence, the Court is not persuaded that defendant is entitled to a new trial under the traditional standards stated in *Ward*. The heart of defendant's present motion is his belief that given the opportunity to present his newly discovered evidence, Braxton Jones' testimony would be sufficiently impeached so as to bolster the defense theory that Jones, not Widgery, was the real perpetrator of a fraud. Therein lies the problem, however. The newly discovered evidence proffered by Widgery is merely impeaching and does not constitute substantial evidence in defendant's favor. Under the principles recognized in *Ward*, evidence

which is simply cumulative and impeaching is not sufficient to warrant the granting of a new trial. Hence, even though the evidence offered by defendant may be more favorable to his theory of the case, it does not satisfy the requirements for the granting of a new trial.

Beyond the foregoing, the Court also finds that the defendant has not demonstrated that the evidence he now tenders in support of his new trial motion could not have been discovered previously through the exercise of due diligence. "[I]t is well-settled that the burden is upon the movant in a new trial motion to establish that he could not, with due diligence, have discovered the evidence before, or at the latest, at trial." *United States* v. *Schwartzbaum*, 527 F.2d 249, 254 (2d Cir. 1975), *cert. denied*, 424 U.S. 94, 96 S. Ct. 1410 (1976). Widgery has failed to meet this burden. While it might be argued that the evidence in question is newly discovered with regard to defense counsel, this does not mean that it was newly discovered as to the defendant personally. *United States* v. *Carlone*, 603 F.2d 63, 67 (8th Cir. 1979). A defendant cannot be said to have exercised due diligence if he fails to investigate leads known to him before trial. *United States* v. *Bullock*, 579 F.2d 1116, 1118 (8th Cir.), *cert. denied*, 439 U.S. 967, 99 S. Ct. 456 (1978). *United States* v. *Schartzbaum*, *supra*, 527 F.2d at 254; *Mills* v. *United States*, 281 F.2d 763, 739 (4th Cir. 1960).

There has been no adequate justification advanced as to why the leads investigated after Widgery's trial and conviction could not have been pursued prior to trial. For example, Widgery obviously knew of the audit report prepared by the accountants Barnaby and Bixby and with due diligence could have presented their testimony and evidence at trial. Similarly, defendant could have easily subpoenaed Robo Wash's corporate tax return for the fiscal year ending October 1, 1977 and refuted Jones' testimony regarding the amount of the company's before tax income. The evidence concerning Jones' allegedly fraudulent manipulation of fabricated purchase orders and sight drafts to obtain financing from Goppert Bank also could have been presented at trial. Briefly, the Court notes that Larry Duggan's recantation of his trial testimony is

highly suspect and entitled to little weight. *United States* v. *Coleman*, 460 F.2d 1038, 1040 (8th Cir.), *cert. denied*, 409 U.S. 871, 93 S. Ct. 200 (1972).

Finally, in determining whether newly discovered evidence is of such a nature that it would probably produce an acquittal, the Court must consider the evidence in light of the entire record made at trial. Examination of the record in this case reveals that although Braxton Jones was an important prosecution witness, his was not the only testimony upon which the jury could rely in determining Widgery's guilt or innocence. Other, persuasive evidence of Widgery's participation in a scheme or artifice to defraud was presented by the government. Moreover, Jones was vigorously cross-examined by defense counsel at trial and his veracity and credibility were seriously challenged. The evidence the defendant now would have the Court consider as newly discovered essentially constitutes a redoubled attack on the credibility of Jones' testimony. Consequently, viewing all the evidence, the Court finds that there is little likelihood that the jury's verdict would have been affected by disclosure of the evidence raised in defendant's new trial motion. Accordingly, it is hereby

ORDERED that defendant's motion for new trial on the ground of newly discoverd evidence be, and is hereby, denied. It is further

ORDERED that the Court's order of January 20, 1981, staying the execution of sentence upon defendant William Arthur Widgery be, and the same is hereby, vacated.

/s/ Scott O. Wright
SCOTT O. WRIGHT
United States District Judge

Kansas City, Mo.
February 11, 1981.

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

No. 79-00134-01-CR-W-5

UNITED STATES OF AMERICA,

Plaintiff,

v.

WILLIAM ARTHUR WIDGERY,

Defendant.

Filed: June 26, 1981

MEMORANDUM AND ORDER

This matter is before the Court on defendant's motion to supplement the record of his previous motion for new trial. On December 29, 1980, following the Eighth Circuit's affirmance of defendant Widgery's conviction on eight counts of wire and mail fraud, *United States* v. *Widgery*, 636 F.2d 200 (8th Cir. 1980), defendant filed a motion for new trial based on the ground of newly discovered evidence. Fed. R. Crim. P. 33. Simply put, the crux of Widgery's motion was that Braxton Jones, president of Robo Wash, Inc. and a key prosecution witness at Widgery's trial, deliberately committed perjury in an effort to shift to Widgery the entire blame for several fraudulent loan transactions involving Goppert Bank. Widgery contended that Jones gave perjured testimony at his trial because Jones himself had defrauded Goppert Bank by obtaining several large loans with fictitious purchase orders presumably submitted to Robo Wash by various business entities. On February 11, 1981, this Court denied defendant's motion for new trial, holding that Widgery had failed to satisfy the requirements established in this circuit for the granting of a new trial on the basis of newly discovered evidence. In so holding, the Court specifically found that the stricter standard of materiality enunciated in *United States* v. *Ward*, 544 F.2d 975, 977 (8th Cir. 1976), was applicable in the context of this

case rather than the less stringent standard applied in cases where the government has knowingly used perjured testimony. *See United States* v. *Runge*, 593 F.2d 66, 73 (8th Cir. 1979).

Upon receipt of the court's order denying defendant's motion for new trial, defendant promptly appealed this determination to the United States Court of Appeals for the Eighth Circuit. While that appeal was pending, defendant filed a motion with the appellate court requesting that this case be remanded so that he might supplement his motion for new trial with additional, newly discovered evidence not previously presented to this Court. The court of appeals thereupon entered an order remanding the case to this court, stating that the "district court shall supplement the record by inclusion of the alleged new evidence . . . and may in its discretion grant an evidentiary hearing if it appears necessary to do so." Defendant has now had full opportunity to supplement the record pertaining to his new trial motion and the Court has carefully considered both defendant's alleged newly discovered evidence and the government's response thereto. Following this review, the Court has concluded that an evidentiary hearing is unwarranted and, further, for the reasons stated herein, that defendant has failed to satisfy the applicable criteria for the granting of a new trial on the ground of newly discovered evidence.

Defendant's supplemental motion again raises the issue of whether Braxton Jones committed perjury at Widgery's trial in order to conceal his own fraudulent dealings with Goppert Bank. In his initial motion for new trial based on newly discovered evidence, Widgery alleged that Jones procured a $40,000 loan from Goppert Bank using a false purchase order purportedly placed by Jurgens Vrooman, Inc. of Beatrice, Nebraska. This purchase order had not been generated by the defendant and Widgery claimed that it had been fabricated by Jones as part of his own scheme to defraud Goppert Bank. Further, the defendant argued that this evidence, as well as other, alleged newly discovered evidence proffered by the

defendant, showed that Braxton Jones was motivated to perjure himself in order to avoid any criminal responsibility on his own part. As indicated, however, applying the standards set forth in *United States* v. *Ward*, *supra*, and other similar cases, this Court declined to grant defendant a new trial. Defendant now offers additional evidence relating to the Jurgens Vrooman transaction which he contends establishes that he is entitled to a new trial under either the *Ward* test or the less burdensome *Runge* standard.

Defendant's latest newly discovered evidence arises out of the pleadings filed in a civil action between Goppert Bank and the Fidelity and Casualty Company of New York. Fidelity issued a comprehensive business insurance policy to Goppert Bank in November, 1976. Goppert Bank has sued Fidelity on this policy, claiming that the insurer is liable to the bank for certain losses sustained by the bank in its financial dealings with Robo Wash. In connection with discovery conducted in that case, Goppert Bank informed Fidelity that it first learned that the Jurgens Vrooman purchase order was fabricated in February, 1978. Goppert Bank further indicated, in a "proof of loss" form submitted to the insurance company, that the circumstances of this fraudulent transaction were reported to the Kansas City office of the Federal Bureau of Investigation on March 30, 1978. Defendant contends that the evidence he has uncovered in this civil suit establishes that the government had knowledge that Robo Wash, *i.e.*, Braxton Jones, used a false purchase order to acquire a $40,000 loan, but failed to disclose this information to the defendant. Because this presumably favorable evidence was never disclosed to the defendant, Widgery argues that there are some serious questions concerning the propriety of the government's conduct in prosecuting him. Further, defendant submits that the government's attorneys knew or should have known that Jones was likely to give perjured testimony at his trial in order to conceal his own criminal activities.

Although defendant continues to urge this Court to grant him a new trial on the theory that his initial trial was irreparab-

ly tainted by perjury, the Court remains unconvinced that defendant has carried the burden necessary to entitle him to such relief. The Court still firmly believes that the alleged newly discovered evidence tendered by defendant must be evaluated in light of the standard articulated in *Ward*. As this Court noted in its prior order denying defendant a new trial, the *Runge* standard is applicable only to those cases where the defendant has produced evidence of specific instances of prosecutorial misconduct. In this case defendant's newly discovered evidence falls far short of establishing specific instances of prosecutorial misbehavior or that there has been an intentional governmental " 'corruption of the truth-seeking function of the trial process.' " *United States* v. *Runge*, *supra*, 593 F.2d at 73, quoting *United States* v. *Agurs*, 427 U.S. 97, 104, 96 S. Ct. 2392, 2397 (1976). Essentially, defendant's evidence relating to the prosecution's knowledge of Jones' alleged perjury is based on speculation and conjecture. Defendant surmises that because Goppert Bank reported the incident of the false Jurgens Vrooman purchase order to the FBI, the prosecuting attorneys must have been aware of Jones' alleged misdeeds and knew or should have known that Jones was susceptible to perjury. Such a tenuous claim of prosecutorial misconduct, however, is insufficient reason for granting defendant a new trial based on *Runge*. Support for this conclusion is found in the Eighth Circuit's decision in *United States* v. *Carlone*, 603 F.2d 63 (8th Cir. 1979).

In *Carlone* the defendant sought a new trial primarily on the ground that the government had improperly failed to disclose that William Sorg, a brother-in-law of defendant's brother, was a paid government informant. Following Carlone's trial and conviction, Sorg provided Carlone with an affidavit wherein he claimed that he had been paid by FBI to assist that agency in setting up Carlone for arrest and prosecution on a spurious criminal charge. Carlone argued that if this information had been revealed to him before or during this trial he would have refused to enter into a stipulation with the government regarding the lawfulness of certain actions by the government. More-

over, Carlone contended that he would have called Sorg as a witness and used his testimony to attack the credibility of the government's primary witnesses, the two FBI agents who arrested him. Relying upon the standard set out in *Ward*, the district court denied defendant's motion for new trial. On appeal Carlone agrued that the lower court erroneously utilized the *Ward* test and that the *Runge* standard should have been applied under the circumstances of his case. The court of appeals, however, disagreed:

> Assuming arguendo that the newly discovered evidence *might* affect the credibility of the agents' testimony, and consequently might have made Carlone's defense of harassment more believable, leading him not to make the stipulation, such newly discovered evidence does not create a factual situation that falls within the *Runge* standard. The line of cases from which the *Runge* standard, adopted by this court, arose includes *United States* v. *Agurs*, 427 U.S. 97, 96 S. Ct. 2392, 49 L.Ed.2d 342 (1976); *Giglio* v. *United States*, 405 U.S. 150, 92 S. Ct. 763, 31 L.Ed.2d 104 (1972); and *Napue* v. *Illinois*, 360 U.S. 264, 79 S. Ct. 1173, 3 L.Ed.2d 1217 (1959). These cases all involve specific instances of prosecutorial misconduct, such as the use of "known perjured testimony," or other governmental corruption of the truth finding process resulting in a deprivation of fundamental due process. The newly discovered evidence in this case does not establish any specific claim that the F.B.I. agents who testified at Carlone's trial perjured themselves, nor does it establish any specific claim of governmental corruption concerning Carlone's trial and the incidents involved therein.

United States v. *Carlone*, *supra*, 603 F.2d at 67 (emphasis original).

In the present case Widgery likewise has failed to produce any evidence which would support a specific claim that the government knowingly presented perjury testimony or permitted false testimony to go uncorrected. Considered in its most favorable light, Widgery has presented evidence from which it might be inferred that Braxton Jones had a motive to commit perjury. There has been no showing that Jones did in

fact give perjured testimony regarding Widgery's participation in the transactions for which he was prosecuted. Widgery's newly discovered evidence simply indicates that the government may have been negligent in failing to discover and disclose evidence which might have been favorable to the defendant's case. This clearly does not amount to a governmental corruption of the truth seeking process as contemplated by *Runge* and *Agurs*. Thus, the Court concludes that the defendant has failed to produce specific or concrete evidence of prosecutorial misconduct which would justify an application of the *Runge* standard to the facts of this case.

Finally, the Court briefly examines defendant's supplemental new evidence under the traditional test enunciated in *Ward*. As with defendant's previous newly discovered evidence, this evidence basically is cumulative and impeaching and it is not of such a nature that, if presented in a new trial, it would "probably produce an acquittal." *United States* v. *Ward*, *supra*, 544 F.2d at 977. Defense counsel made Jones' credibility a major issue in Widgery's trial. He was vigorously cross-examined and the jury was left with little doubt that the defendant seriously disputed the truthfulness of Jones' testimony. The evidence now offered by Widgery merely intensifies the attack on Jones' credibility and, with respect to the crimes for which Widgery was convicted, it does not comprise substantial, independent evidence of his innocence. Hence, the Court finds that defendant's supplemental new evidence is not sufficient to satisfy the requirements established by *Ward* for the granting of a new trial. Accordingly, upon consideration of defendant's supplemental evidence in support of his motion for new trial, it is hereby

ORDERED that defendant's motion for new trial be, and is hereby, denied for the reasons stated above.

/s/ Scott O. Wright
SCOTT O. WRIGHT
UNITED STATES DISTRICT JUDGE

June 26, 1981

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 80-1385

UNITED STATES OF AMERICA,

Appellee.

v.

WILLIAM ARTHUR WIDGERY,

Appellant,

Appeal From The United States District Court For The Western District Of Arkansas

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Submitted: October 17, 1980
Filed: December 5, 1980

Before LAY, Chief Judge; BRIGHT and MCMILLIAN, Circuit Judges.

BRIGHT, Circuit Judge.

Widgery was charged in a twenty-eight count indictment with mail fraud and wire fraud, in violation of 18 U.S.C. §§ 1341 and 1343 (1976). A jury found Widgery guilty of counts I through X of the indictment. The district court sentenced him to five years on each of the ten counts, the sentences to run concurrently, and fined him $500 on each count. On appeal Widgery contends that 1) the Government's evidence failed to establish a scheme to defraud and the requisite use of the mails and wire communications in furtherance of the alleged scheme and 2) the district court erred in refusing to grant a mistrial on grounds of jury bias and the extensive time taken for jury deliberations. We set aside his conviction on counts V and X and affirm on the remaining counts.

I. The Charges.

William Arthur Widgery, a self-proclaimed business consultant who could "turn failing businesses around," entered into an agreement with Robo Wash, Inc., a Missouri manufacturer of automatic car wash equipment on February 4, 1977. The agreement called for Robo to transfer 625,000 shares of "lettered" common stock to Widgery if he provided operational and administrative assistance, engaged in promotional and sales activities, and produced $135,000 in before-tax net income prior to October 1, 1977. The resultant mail and wire fraud counts upon which the Government obtained a conviction related to alleged fraudulent orders for car wash equipment placed with Robo by Widgery.

In August 1977, Widgery and his associated, Harvey Jefferson, induced Haskell Stone, a building inspector for the city of Indianapolis, to sign a purchase order for car wash equipment, knowing that Stone owned no assets justifying an extension of credit for such a purchase. To fund this purchase order, Widgery, on behalf of Stone, applied for a Small Business Administration (SBA) loan. The Government charged that Widgery, knowing that Stone possessed no assets, filled out this loan application to falsely show that Stone owned real estate and other assets.[1] Widgery thereafter influenced George Hunter, Assistant Director of the SBA in Indianapolis, to issue an "Authorization and Loan Agreement" indicating approval of a $112,000 interim loan.[2] Widgery's mailing of the Stone purchase order to Robo forms the basis for count I of the indictment.

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[1] Although Widgery told Stone he would transfer stock and land to him to pump up his financial statement, this transfer was never completed.

[2] Widgery took the SBA loan authorization to the Springs Valley National Bank in French Lick, Indiana. Based upon this authorization, that bank made a loan to Widgery and Stone in the amount of $112,000. This money was deposited in Widgery's account in the

On the strength of Stone's $85,000 purchase order, Robo borrowed $60,000 from the Goppert Bank & Trust Company of Kansas City, Missouri. Thereafter, Widgery called the president of Robo and made the allegedly false representation that Jefferson needed an advance commission on the Stone sale to purchase an option on a car wash site. Counts II and III charged that Widgery's telephone call and Robo's subsequent wiring of an $8,550 advance constitute wire fraud.

During November of 1977, Widgery mailed to Robo an $108,482.40 purchase order signed by Larry Duggan as president of Sun Coast Dock & Davit Corporation. The contract allegedly bore the forged signature of Duggan and named a nonexistant corporation. On receipt of this purchase order, Robo borrowed $40,000 from the Goppert Bank. In Count IV the Government charges that Widgery committed mail fraud by mailing Duggan's purchase order to Robo.

Subsequent to mailing of Duggan's purchase order, Widgery contacted the president of Robo, allegedly by telephone, to request an advance on the Duggan sale so that Widgery might purchase an option on a car wash site. Funds were deposited to Widgery's account, but the record shows no evidence of any purchase. This alleged telephone call and the wiring of an $2,218 advance by Robo form the basis for counts V and VI of the indictment.

In October 1977, Widgery mailed a purchase order to Robo on behalf of Charles Howell, representing that Howell ordered car wash equipment in the sum of $57,203. The Government

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American-Fletcher National Bank in Indianapolis. Widgery then wrote Stone and Jefferson each a check for $3,000.

The SBA never funded this loan because of Stone's lack of credit. Widgery then applied for a SBA loan on behalf of a James Gerard. Hunter approved the Gerard loan and the Springs Valley National Bank granted Gerard interim financing based on this approval. Widgery used these proceeds to pay off the Stone loan. The SBA, however, also cancelled its authorization of the Gerard loan.

alleged that Howell signed the order in blank, never intending to purchase the equipment. Again, Robo borrowed funds from the Goppert Bank on the strength of that order. The mailing of Howell's order by Widgery forms the basis for count VII. Based on the Howell purchase order, Widgery sought an advance purportedly for Jefferson to purchase an option on a car wash site. Counts VIII and IX allege that his telephone call to the president of Robo and the wiring of an $8,580 advance constitute wire fraud.

As part of his dealings with Howell, Widgery encouraged Robo to take over Midwest Cabinet Manufacturing Company of South Bend, a business owned by Howell.[3] Based on a document evidencing Midwest's agreement to the takeover, Hunter issued a SBA loan authorization letter to Robo and Midwest.[4] Widgery mailed this authorization to Robo and that mailing forms the basis for the count X mail fraud charge.[5]

In connection with the Midwest takeover, Robo agreed to pay certain expenses of Midwest. Counts XI to XXVIII charged mail fraud regarding checks Robo mailed to Widgery for these expenses. The jury found Widgery not guilty on these eighteen counts.

II. Sufficiency Of The Evidence.

Widgery alleges that the Government's evidence failed to establish a scheme to defraud and the requisite use of the mails or wire communications. In reviewing this claim, we must view the evidence in the light most favorable to the Government and

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[3] Widgery advised Jones, the president of Robo, to take over the failing business based on Midwest's contracts with Sears, Roebuck & Co. and the United States Postal Service.

[4] The SBA lost $90,000 on a previous Midwest loan approved by Hunter.

[5] Robo used this loan agreement to obtain a $50,000 loan from the Goppert Bank.

sustain the verdict if it is supported by substantial evidence. *Glasser* v. *United States*, 315 U.S. 60, 80 (1962).

Direct evidence of intent to defraud is not required. A jury may infer intent rom all the facts and circumstances of the case. *United States* v. *Gilbertson*, 588 F.2d 584, 587 (8th Cir. 1978). In this case there was ample evidence from which a jury could reasonably infer intent to defraud. The Government's proof clearly established a pattern of fraud in mailing the bogus purchase orders of Stone, Duggan, and Howell, in obtaining a SBA loan authorization for Stone, and in requesting advance commissions on the purchase orders.[6]

Moreover, except for count V, the Government proved the requisite mailing or use of wire facilities needed to support Widgery's conviction. The Government concedes that it failed to establish the telephone call necessary to support a conviction on count V; thus, we reverse the conviction on that count.

After carefully reviewing the evidence on count X charging Widgery with mailing to Robo a fraudulent SBA authorization, we must conclude that the evidence is insufficient to support a conviction on this count. The SBA issued this authorization to Robo and Midwest based on a valid, written takeover agreement. Although both fims were financially unsound, there is no evidence that Widgery misrepresented their financial condition in the application or that Widgery misrepresented Midwest's financial condition to Robo in advising the takeover. Furthermore, after the takeover, Robo did pay, as agreed upon, certain expenses of Midwest; the jury rejected all of the

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[6] Howell and Duggan denied that they ordered car wash equipment or owned sufficient assets to purchase such equipment. Stone testified that although he told Widgery he was interested in purchasing a car wash, he also informed Widgery that he had no assets. Stone also claimed that Widgery filled out the false SBA application form. Jefferson stated that he had never received advance commissions to purchase options on car wash sites.

fraud claims relating to the payment of these expenses. Widgery's conviction on count X, therefore, cannot stand.

III. Mistrial.

Widgery also argues that the court should have declared a mistrial because of alleged jury misconduct[7] and because the jury deliberated eleven hours over a Saturday and a Sunday. We find no merit in either contention. The trial court clearly acted within its discretion in denying Widgery's motions for a mistrial.

Accordingly, we set aside Widgery's convictions on counts V and X and affirm his conviction on the remaining counts.

A true copy.

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[7] After several hours of jury deliberation, Widgery's counsel asserted that (male) juror number 6 has been "blowing kisses, winking [and] waving" to Miss Clark, as Assistant United States Attorney who assisted in the prosecution. Counsel requested a mistrial, asserting that the conduct of the juror had signaled either a guilty verdict or a hung jury to Ms. Clark. The court rejected counsel's suggestion as speculative, but did not foreclose a postverdict motion for relief on "some showing that this jury was prejudiced in some way." Appellant presented no additional evidence of jury bias in his posttrial motion.

We note initially that because counsel observed the juror's allegedly improper conduct during the trial, he properly should have called the court's attention to the alleged misconduct of the juror before the close of the trial when two alternate jurors were excused. On the record made during jury deliberations supported only by counsel's statement of his observations, we cannot say that the trial court erred in denying a mistrial.